STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0154 (Mercer County 10-M-AP-01)

John Mack Wright
Defendant Below, Petitioner

FILED
March 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John Mack Wright, by counsel, Joseph T. Harvey, appeals from the "Order Denying Petition for Appeal of Trial by Jury" signed by the Honorable William J. Sadler, Judge of the Mercer County Circuit Court, on December 20, 2010, affirming petitioner's conviction following a jury trial in magistrate court for second offense driving under the influence of alcohol. Respondent State of West Virginia, by counsel, Jake Morgenstern, has filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was tried before a jury in magistrate court and convicted of second offense driving under the influence of alcohol in violation of West Virginia Code §17C-5-2. Petitioner appealed his magistrate court conviction to the circuit court and raised issues involving jury selection, the admissibility of the horizontal gaze nystagmus test, and whether there was a reasonable articulable suspicion to initiate the traffic stop that led to petitioner's arrest, which are the same issues raised in his appeal to this Court. After the issues were briefed and following a hearing, the circuit court entered a twenty-eight-page order on December 20, 2010, affirming petitioner's conviction and finding that "[a]fter due and careful consideration of the Petition, the record, the audio recording[1] of the underlying

[1] Because magistrate courts are not courts of record in West Virginia, there is no official written transcript of the underlying magistrate court proceedings. The circuit court stated in its order of December 20, 2010, that the dialogue quoted in its order was transcribed by the circuit court from the audio recording of the motions hearing and trial proceedings in magistrate court.

motions hearing, *voir dire*, and trial as well as consulting pertinent legal authorities, the Court finds no clear error or abuse of discretion by the magistrate court."

Jury Selection

Petitioner argues, as he did before the circuit court, that he was denied a fair trial because the magistrate court failed to excuse two prospective jurors, Lindell Hatcher and Phillip McKenzie, from the jury panel. Petitioner argues that even though Mr. Hatcher twice stated that he could fairly judge the evidence, he could not be impartial because he knew two people who had been injured by drunk drivers. Petitioner argues that Mr. McKenzie would be partial to the testimony of a law enforcement officer because he previously served as a law enforcement officer at Concord University. Petitioner ultimately struck Mr. Hatcher, but did not remove Mr. McKenzie.

The record reflects that Mr. Hatcher and Mr. McKenzie each confirmed his ability to be fair during voir dire, which the magistrate court considered in determining that neither of them possessed any bias or prejudice that would preclude him from serving on the jury. The circuit court considered this issue and thoroughly discussed the same in its order affirming petitioner's magistrate court conviction concluding that the magistrate court's ruling was proper.

This Court has recognized that "[t]he challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused [sic]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." Syl. Pt. 6, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). With this standard in mind and based upon our consideration of the merits of petitioner's arguments as set forth in his brief and our review of the record designated on appeal, this Court finds no error in the magistrate court's refusal to strike these two jurors for cause.

Field Sobriety Test

Petitioner argues that he was denied a fair trial because the magistrate court erroneously admitted the testimony of the arresting officer, Trooper Moore, concerning the horizontal gaze nystagmus ("HGN") test, even though he was not qualified as an expert witness to testify about the test. Relying upon *State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988), petitioner argues that his constitutional right to a fair trial was denied by the introduction of the HGN test without expert testimony or proof of scientific principles upon which the test is based. On appeal from magistrate court, the circuit court observed that Trooper Moore's general testimony concerning HGN tests included administering the test to petitioner and relating the conclusions he drew from the results, which did not include an

estimate of petitioner's blood alcohol level. Thus, the circuit court concluded that Trooper Moore's testimony did not cross into the type of testimony that is prohibited by *Barker*.

In *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996), this Court stated that *Barker* allows the admission of the results of the HGN test as evidence that the driver was under the influence of alcohol. In *Muscatell*, and as the circuit court found in the case-at-bar, the officer testified concerning the HGN test, but did not attempt to estimate the blood alcohol content with the test nor did he give the test any greater value than any of the other field sobriety tests he had administered. Accordingly, we find no error in the admission of Trooper Moore's testimony regarding the HGN test.[2]

Traffic Stop

Petitioner asserts that at no point did Trooper Moore observe him in the process of committing or about to commit any criminal act. Petitioner argues that there was no reasonable suspicion justifying the traffic stop; that it was an illegal seizure under the Fourth Amendment of the United States Constitution; and that all evidence gathered subsequent to the stop was illegally obtained under the doctrine of the fruit of the poisonous tree.

The circuit court's order reflects that Trooper Moore testified in magistrate court that petitioner "shot off in front of" him as the traffic light turned green "as if he was trying to race, causing the tires of [petitioner's] vehicle to squeal." On appeal from magistrate court, the circuit court, relying on *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994), noted that constitutional protections are satisfied for reasonable suspicion "when an officer can identify specific facts which provided some minimal level of objective justification for the traffic stop." As the circuit court correctly noted, a court must examine the totality of the circumstances in determining whether there was reasonable suspicion for the traffic stop. Given the totality of the circumstances and Trooper Moore's observations, both the magistrate and circuit courts concluded that Trooper Moore had a reasonable suspicion to stop petitioner's vehicle.

> [R]ulings on the admissibility of evidence are properly within the discretion of the circuit court, and this Court will not overturn such rulings absent an

[2] In the recent opinion of *White v. Miller*, No. 11-0171 (W.Va. Mar. 26, 2012), this Court provided a thorough discussion of the HGN test and held, inter alia, that "the police officer who administered the test, if asked, should be prepared to give testimony concerning whether he or she was properly trained in conducting the test, and assessing the results, in accordance with the protocol sanctioned by the National Highway Traffic Safety Administration and whether, and in what manner, he or she complied with that training in administering the test to the driver." *Id.* at Syl. Pt. 2. In the case at bar, petitioner states that Trooper Moore was not questioned regarding his training and experience to perform the HGN test.

> abuse of discretion. 'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), overruled on other grounds by *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).

State v. Doonan, 220 W.Va. 8, 12, 640 S.E.2d 71, 75 (2006). Based on the foregoing, the Court finds that the traffic stop was proper and that there was no abuse of discretion in the admission of the evidence related to the traffic stop, including the subsequent investigation and arrest.

Conclusion

"To the extent that the issues presented in this case involve questions of law and statutory interpretation, our review is *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Our review of the final order and ultimate disposition by the circuit court is under an abuse of discretion standard, and we review the underlying factual findings of the circuit court using a clearly erroneous standard. Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995)." *State v. Chanze*, 211 W.Va. 257, 259, 565 S.E.2d 379, 381 (2002). With these standards in mind and based upon our review of the record and the briefs, and for the reasons set forth above, we find no abuse of discretion or clear error. Accordingly, we affirm.

Affirmed.

ISSUED: March 30, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh